Supreme Court, U.S.
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No. 92-438

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, *et al.*,

Petitioners,

-against-

CHARLES BROWN and JAMES WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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In another case involving the right to a federal forum under 28 U.S.C. § 1442—the same right petitioners claim here—the United States argues that "appellate review is necessary to prevent irretrievable loss of this federal right." *See* p. 5, *infra*. Because the United States' position solidly supports appellate review here, petitioners request that the Court invite the United States to express its views on certiorari.

ARGUMENT

The Court Should Solicit the Views of the United States Regarding Certiorari, Because the United States Contends that an Order Remanding for Lack of Subject Matter Jurisdiction Under 28 U.S.C. §1442 May Be Reviewed on Appeal Consistent with 28 U.S.C. § 1447(d).

In briefs filed in the United States Court of Appeals for the Sixth Circuit, the United States argues that, where jurisdiction is claimed under 28 U.S.C. § 1442 (as petitioners claim in this case), an order remanding to state court for lack of subject matter jurisdiction may be reviewed on appeal. *See* Brief for the United States as Amicus Curiae Supporting Trooper Wright dated August 21, 1991 ("U.S. Brief"), Supplemental Materials at Tab A, and Supplemental Brief of the United States as Amicus Curiae before the En Banc Court dated August 31, 1992, ("U.S. Supp. Brief"), Supplemental Materials, Tab B, filed in *Miami County Municipal Court v. Wright*, No. 91-3615, 1992 WL 92353 (6th Cir. July 30, 1992) (panel opinion withdrawn and rehearing en banc granted), Supplemental Materials, Tab C.[1]

In *Wright*, a state trooper had seized $12,000 as suspected drug proceeds. The federal Drug Enforce-

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[1]The briefs of the United States and the unpublished opinions in *Wright* have been lodged with the Court as Supplemental Materials. Petitioners learned of the withdrawal of the panel opinion in *Wright* on the eve of filing their petition for certiorari, and so deleted discussion of that opinion from their petition. Petitioners learned of the views expressed by the United States as amicus curiae in *Wright* after their petition for certiorari had been filed.

ment Agency ("DEA") adopted the seizure pursuant to 21 U.S.C. § 881 and took possession of the funds. A state judge ordered the state trooper to return the funds, and, when the DEA refused, had the trooper arrested and charged with contempt.

The state trooper removed the case to federal court under 28 U.S.C. § 1442(a)(1), arguing (like petitioners below) that he was "acting under" a federal officer. The district court remanded the case for lack of subject matter jurisdiction, finding that there was no jurisdiction under § 1442 because the trooper had failed to allege a colorable federal defense as required under *Mesa v. California*, 489 U.S. 121 (1989). *State of Ohio v. Wright*, No. C-3-88-096, 1992 WL 123194 (S.D. Ohio May 12, 1990), Supplemental Materials, Tab D.

On appeal, the United States as amicus curiae argued that the court of appeals had appellate jurisdiction despite the remand for lack of subject matter jurisdiction because the remand order was based on "a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." U.S. Brief at 12, *quoting Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). Because the district court's "substantive decision" that the trooper's asserted federal defense was insufficient might be applied against him in the state proceeding on remand, the remand order was not limited "to just matters of jurisdiction." Thus, the United States concluded that appellate review of the remand order was proper, consistent with 28 U.S.C. § 1447(d), *citing City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) (predecessor of § 1447(d) did not bar appellate review of dismissal of

party which resulted in remand for lack of subject matter jurisdiction).

In this case, as in *Wright*, the District Court addressed federal defenses implicating important federal interests: immunity of government contractors under the Defense Production Act and the government contract defense and preemption under the Federal Insecticide, Fungicide, and Rodenticide Act. *See, e.g.*, A33-A37. Petitioners, like the trooper in *Wright*, are faced with at least a risk of preclusion[2] and thus are similarly entitled to appellate review under the United States' reading of § 1447(d). *See* U.S. Brief at 12 (appellate review of remand order available consistent with § 1447(d) if decision on federal defense "may" be given preclusive effect).

Congress intended for the right to a federal forum under § 1442 to be interpreted broadly. U.S. Supp. Brief at 15. The United States stressed the importance of the right to a federal forum for persons "acting under" federal officers:

> The very "purpose of * * * the federal officer removal statute, was to provide a federal forum in any case where a federal official might raise a defense arising from his official duties, and to permit any state law question to be tried upon the merits in an environment free of local interests or prejudice."

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[2]While the District Court's statements regarding the nature and scope of the federal defenses should be given no preclusive effect against petitioners on remand to state court, respondents can be expected to argue some theory of preclusion.

U.S. Brief at 11, *quoting Kentucky v. Long*, 837 F.2d 727, 750 (6th Cir. 1988). This right to a federal forum must be protected by a right to immediate appeal for the same reasons that this Court allowed immediate review of orders denying federal employees absolute or qualified immunity from civil suits. U.S. Brief at 13, *citing Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). The United States thus concluded that "[a]ppellate review is necessary to prevent irretrievable loss of this federal right." *Id.*

In view of the United States' confirmation of the important federal interest in appellate protection of the right to a federal forum under § 1442, this Court should invite the United States to express its views on this petition for certiorari. This conclusion is reinforced by petitioners' argument that review is available by certification under 28 U.S.C. § 1292(b), an option not available in *Wright*. Having argued in *Wright* that review was available both under the collateral order doctrine and the All Writs Act,[3] the United States may also view appellate review of remand orders under § 1292(b) as an appropriate additional means of protecting the right to a federal forum under § 1442 and as the proper accommodation of the seeming conflict between § 1292(b) and § 1447(d).

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[3]The United States concluded that the remand order "is an appealable collateral order pursuant to 28 U.S.C. 1291." U.S. Brief at 13. In the alternative, the United States argued that the remand order could be reviewed under the authority of the All Writs Act, 28 U.S.C. § 1651, *citing Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571 (4th Cir. 1989). *Id.* at n.8.

Petitioners here claim the same right under § 1442 as the state trooper claimed in *Wright:* a right as persons "acting under" federal officers to have their federal defenses heard in a federal forum. The United States squarely supports that right and contends that the right to a federal forum must and can be protected by appellate review of remands to state court, consistent with § 1447(d).

CONCLUSION

Accordingly, the Court should invite the United States to express its views regarding the questions presented for certiorari, and the writ of certiorari should be granted.

Dated: Uniondale, New York
November 20, 1992

Respectfully submitted,

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